UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

OBERTHUR TECHNOLOGIES OF AMERICA CORPORATION

and

Cases: 04-CA-086325 04-CA-087233 04-RC-086261

GRAPHIC COMMUNICATIONS CONFERENCE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 14-M

EMPLOYER'S ANSWERING BRIEF TO CROSS-EXCEPTIONS OF GRAPHIC COMMUNICATIONS CONFERENCE, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 14-M, AND REPLY TO LOCAL 14-M'S ANSWERING BRIEF TO EMPLOYER'S EXCEPTIONS TO DECISION OF THE ADMINISTRATIVE LAW JUDGE

Oberthur Technologies of America Corporation ("Oberthur"), by its undersigned counsel, hereby responds to the Brief filed in this matter on April 1, 2013 by the Graphic Communications Conference, International Brotherhood of Teamsters, Local 14-M (the "Union").

Although the Union styles its April 1 filing as "Cross-Exceptions," the Union raises only a single Exception to the ALJ's Decision, which is accompanied by no supporting argument apart from a lone footnote. The Union's Cross-Exception is without merit and should be overruled.

By its Brief, the Union also offers arguments in response to four of the Exceptions raised by Oberthur. Each of the Exceptions at issue will be separately addressed herein.

I. The Union Has Failed to Identify a Valid Basis for its Exception to the ALJ's Failure to Sustain an Objection Relating to Comments Made by Supervisor Frank Belcher, To Which the Union Itself Chose Not to Object.

The sole Cross-Exception raised by the Union pertains to the ALJ's decision not to find an objection based on comments made by an Oberthur supervisor that employees should refrain from discussing union issues in working areas during working time. [Union Brief, p. 2].

Notwithstanding the Union's failure to file an objection on this basis, the ALJ did in fact consider the issue of whether the conduct was objectionable. [Decision, p. 11 n. 11]. Although the ALJ had found that the directive limiting discussion on working time in work areas was a violation of Section 8(a)(1), the ALJ recommended dismissal of any objection based on that conduct based on the fact that "all of those incidents except two involving a single employee, occurred before the Petition was filed and therefore were outside the critical period." [Id.].

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¹ Oberthur incorporates once again its argument, fully set forth in its Exceptions and its Reply to the Answering Brief of Counsel for the Acting General Counsel, regarding the effect of the D.C. Circuit's recent decision in *Noel Canning v. N.L.R.B.*, 705 F.3d 490 (D.C. Cir. 2013), on the Board's capacity to consider the pending appeals from the ALJ's Decision.

The Union's argument in support of its Cross-Exception – which is limited to a single footnote – does not appear to take issue with the ALJ's holding that statements made by Belcher to a group of employees cannot support an objection because they occurred prior to the filing of the petition. [*Id.* (citing *Ideal Electric Mfg. Co.*, 134 N.L.R.B. 1275 (1961))]. Nor does the Union identify any facts which would purportedly support consideration of events outside the critical period. The Union instead asserts that the two comments made by Belcher to Linda Thompson in August 2012 are, standing alone, sufficient to compel a finding that Oberthur engaged in objectionable conduct sufficient to set aside the election. [Union Brief, p.2 n.1].

The Union's argument on this issue is without merit. When the conduct at issue is examined under the nine-factor test for evaluating objectionable conduct as articulated in *Taylor Wharton Harsco Corp.*, 336 N.L.R.B. 157 (2001), it is plain that Belcher's comments to Thompson do not qualify as objectionable. In *Taylor Wharton*, the Board identified the following nine factors as relevant to the determination of whether conduct occurring in the course of an organizing campaign will support an objection:

In determining whether a party's misconduct has the tendency to interfere with employees' freedom of choice, the Board considers: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. See, e.g., *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986).

Id. at 158.

These factors weigh overwhelmingly against sustaining an objection on the basis of Belcher's comments to Thompson. As an initial matter, application of the factors is premised on a predicate finding of "a party's misconduct." *Id.* As reflected in its Exception Five, it is Oberthur's position that its implementation of a rule restricting discussions on the work floor during work time was not in violation of Section 8(a)(1) of the Act. In the event that Oberthur's Exception Five is sustained, the Union's Cross-Exception will be moot based on an absence of "misconduct" by Oberthur. Assuming *arguendo* that the ALJ's finding of an unfair labor practice is sustained, Belcher's comments to Thompson are nonetheless insufficient to support a violation under the none-factor test.

As to factor one, the number of incidents is minimal. The sole conduct at issue during the critical period as found by the ALJ consisted of Belcher making statements to Thompson on two occasions in August 2012 that employees should discuss the Union in the locker area, in the cafeteria, or outside the plant, as opposed to on the work floor during working time. [Decision, p.6]. As to factor two, the incidents were unlikely to cause fear among employees in the bargaining unit, as Belcher's comments were not accompanied by any discipline or threat of discipline.

Factor three likewise weighs against sustaining an objection, as the ALJ determined that only a single employee in the bargaining unit was the subject of the comments during the critical period. [Decision, p. 11 n.11]. Factor four is of limited utility in the present circumstance, as Thompson was unable to testify as to when the two comments at issue were made, apart from the fact that they occurred in August 2012. [Decision, p. 6] Based upon that testimony, the comments were made between one and five weeks prior to the election on September 7, 2012.

Factor five weighs against sustaining an objection, as there was no testimony suggesting that the comments at issue "persist[ed] in the mind" of Thompson through the time of the election. Factor six likewise does not support sustaining an objection, as there was no testimony from Thompson that she disseminated Belcher's comments among the unit employees. Factor seven is neutral, as there was no evidence introduced of misconduct which would tend to "cancel out" the effect of Oberthur's implementation of the hold.

Because this analysis assumes *arguendo* that Belcher's comments were in violation of the Act, factors eight and nine would weigh in support of sustaining an objection. Those factors, however, are significantly outweighed by the first seven factors. Thus, the ALJ did not err in declining to find an objection on the basis of Belcher's comments. The Union's Cross-Exception should therefore be overruled.

II. The Union's Argument in Response to Oberthur's Exception Number One Is Unavailing, as the ALJ Erroneously Failed to Apply the *Desert Palace* Analysis.

Oberthur's first Exception is grounded in the ALJ's failure to apply the standard announced by the Board in *Desert Palace, Inc. d/b/a Caesars Tahoe*, 337 N.L.R.B. 1096 (2002) when resolving the challenges made by the Union to the ballots cast by John DiTore and Ben Sahijwana.

The Union acknowledges that the ALJ failed to reference *Desert Palace* in his Decision, but nevertheless asserts that the ALJ properly decided the issue by examining whether or not DiTore and Sahijwana shared a community of interest with the other unit employees. [Union Brief, p. 3]. In so arguing, the Union simply ignores the applicable test under *Desert Palace*. Had that test been properly applied by the ALJ, the community of interest inquiry would never have been reached.

In articulating the standard for determining the inclusion or exclusion of employees from a bargaining unit, the Board explaining in *Desert Palace* that:

[T]he Board must first determine whether the stipulation is ambiguous. If the objective intent of the parties is expressed in clear and unambiguous terms in the stipulation, the Board simply enforces the agreement. If, however, the stipulation is ambiguous, the Board must seek to determine the parties' intent through normal methods of contract interpretation, including the examination of extrinsic evidence. If the parties' intent still cannot be discerned, then the Board determines the bargaining unit by employing its normal community-of-interest test.

337 N.L.R.B. at 1097.

It is the first step of the analysis which is dispositive as to DiTore and Sahijwana. Although the Union attempts to sidestep the plain language of the Stipulated Election Agreement by asserting that "the stipulation fails to reveal anything concerning engineers or managers," DiTore and Sahijwana are unambiguously included within the scope of the stipulated unit. The stipulation defines the unit as follows:

Included: All full-time employees employed by the Employer in litho printing, finishing card and sheet, ink, facilities janitorial, card auditing plastics, pre-press composition, QC [quality control], smart card embedding, screen making, screen printing, production expeditor, quality systems analyst, warehouse plastic, customer service manufacturing, and maintenance departments at its facility located at 523 James Hance Court, Exton, PA.

[Decision, p. 3].

It is undisputed that both DiTore and Sahijwana are full-time employees in the quality control department at the Exton facility. [Decision, pp. 3-4]. Given that the stipulation expressly includes all full-time employees in the quality control department, DiTore and Sahijwana are within the scope of the petitioned-for unit. Because the stipulation is unambiguous, the ALJ's

failure to include DiTore and Sahijwana in the bargaining unit was in error, and the Union's contention that the ALJ properly applied the community of interest test in determining whether to include these individuals in the unit is without merit. *See Desert Palace*, 337 N.L.R.B. at 1097 (holding that where the terms of the stipulation are "clear and unambiguous," the Board "simply enforces the Agreement").

III. The Union Misstates the Nature of Oberthur's Exception Three.

In its third Exception, Oberthur pointed out a necessary corollary to the ALJ's conclusion regarding DiTore and Sahijwana that was not addressed in the Decision. The ALJ concluded, based on the fact that they are engineers, that DiTore and Sahijwana are professional employees and therefore barred as a matter of law from being included in a unit with nonprofessional employees in the absence of a *Sonotone* election. [Decision, p. 5]. As noted in Oberthur's Exception Three, this aspect of the Decision creates an issue in that a third engineer, Khalid Husain, was also included on the Excelsior list and voted without challenge. [Tr., p. 161, 162].

The Union misconstrues Oberthur's Exception as improperly attempting to raise a postelection challenge to Husain's vote. To the contrary, Oberthur believes that Husain was properly included in the unit, as were DiTore and Sahijwana. Oberthur's third Exception simply points out the inherent contradiction in the ALJ's Decision: if Section 9(b)(1) of the Act prohibits DiTore and Sahijwana from inclusion in the unit by virtue of their status as engineers, then certification of the unit would violate Section 9(b)(1) because the unit as presently constituted contains an engineer. This anomaly is particularly pronounced here given that, in light of the present vote tally and the ALJ's order that the ballot cast by employee Scott Hillman be opened and counted, Husain may well have cast the deciding vote in favor of the Union. Contrary to the Union's assertions, Oberthur is not making a belated attempt to change the composition of the unit. Oberthur's Exception is simply a recognition of the fact that the ALJ's finding as to DiTore and Sahijwana – to which Oberthur has excepted – necessarily dictates that Husain is likewise ineligible for inclusion in the bargaining unit pursuant to Section 9(b)(1).

IV. The ALJ Erred in Concluding that DiTore and Sahijwana Are Professional Employees.

Oberthur's fourth Exception concerns the ALJ's conclusion that DiTore and Sahijwana are professional employees and therefore ineligible for inclusion in the unit. The Union's argument in response to this Exception consists chiefly of a restatement of the points which the Union alleges support the contention that DiTore and Sahijwana did not share a community of interest with the unit employees. The question of whether DiTore and Sahijwana shared a community of interest with unit members, however, has no bearing on the question of whether those two individuals meet the standard set forth in Section 2(12) of the Act for identifying professional employees. Under the statutory test, neither DiTore nor Sahijwana are professional employees.

As an initial matter, the ALJ failed to make any finding as to two of the four elements of the definition of professional employee under Section 2(12), namely that their positions involve the consistent exercise of discretion and judgment and are of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time. [Decision, p. 5]. Instead, the ALJ appears to have based his finding on prior Board decisions in which engineers were deemed to qualify as professional employees. [*Id.*]. That reliance was misplaced, however, in light of the fact that DiTore and Sahijwana each testified that neither one performs traditional engineering work. [Tr., pp. 588-89, 632]. The Board's decision *A.A.*

Mathews Associates, 200 N.L.R.B. 250 (1972) - which was cited by the ALJ in a footnote – is instructive. In A.A. Mathews, the Board considered a group of employees classified by the employer as "engineer-inspectors." Id. at 250. The primary duty of the employees involved ensuring the quality of the construction work performed by the employer. Id. The Board concluded, notwithstanding the fact that the employees held engineering degrees, that the employees were not professionals within the meaning of the Act based on the nature of their duties. Id. at 251. Like the employees at issue in A.A. Mathews, DiTore and Sahijwana do not perform traditional engineering work, but rather perform quality control functions attendant to the production process.

The Union's remaining argument as to DiTore and Sahijwana centers on the Board's case law concerning engineers, specifically *Avco Corp.*, 313 N.L.R.B. 1357 (1994). *Avco* provides no support for the Union's argument, however, as the Board noted in that case that it had "consistently found that employees with professional engineering degrees *working in specialized fields of engineering* qualify as professionals. *Id.* at 1358 (emphasis added). In the instant case, both DiTore and Sahijwana confirmed that they do not perform traditional engineering work, as that work is done by employees in a separate department which was not included in the petitioned-for unit. [Tr., pp. 588-89, 632].

The Union further argues that *Avco* supports its attempt to distinguish *Loral Electronics*, 200 N.L.R.B. 1019 (1972), as the *Avco* Board referenced the *Loral Electronics*' employees lack of engineering degrees in discussing why the employees in that case were not considered professionals. [Union Brief, p. 7]. The Union appears to suggest that the holding in *Loral Electronics* that the engineers at issue were not professions can be explained by reference to the education level of the employees at issue. A review of *Loral Electronics* reveals that the basis

for the Board's decision was in fact the nature of the work performed by the engineers, as the Board held that: "the character of the work required of them as a group falls short of that required of professional employees." 200 N.L.R.B. at 1021. The engineers at issue in *Loral Electronics* were engaged in using engineering designs to "decide the most efficient manufacturing procedures," *id.*, the same task which DiTore and Sahijwana identified as the core of their duties at Oberthur. [Tr., pp. 588-89, 632].

Under the statutory standard for professional employees as developed by the Board's case law, neither DiTore nor Sahijwana qualifies as a professional employee. The ALJ's decision to uphold the challenge to the ballots cast by each of them on that basis must therefore be reversed.

V. The ALJ Erred In Sustaining the Union's Objection Fifth Objection.

Of the eight objections filed by the Union, the sole objection which was sustained by the ALJ (Objection No. 5) involved Oberthur's implementation of a hold on wage increases and bonuses in the lead up to the election and its notification to employees regarding the hold. [Decision, p. 11]. This conduct was also the basis for the ALJ's finding of an unfair labor practice, which Oberthur contends was erroneous for the reasons set forth in its Exceptions Six and Seven. In considering Objection No. 5, the ALJ cited, but did not apply, the nine-factor test articulated in *Taylor Wharton Harsco Corp.*, 336 N.L.R.B. 157 (2001). Instead, the ALJ relied on the fact that "I have concluded above that the Employer violated Section 8(a)(1) and (3)" as a result of the wage and bonus hold. [Decision, p. 11].

Because the ALJ's decision to sustain Objection No. 5 was based directly on his finding that Oberthur's conduct in connection with the hold was an unfair labor practice, the decision to sustain the objection must be set aside in the event the Board finds merit in Oberthur's Exceptions Six and Seven. Indeed, the nine factors of the *Taylor Wharton* test are each grounded

in determining the nature of "a party's misconduct." 336 N.L.R.B. at 158. Given that Oberthur's implementation of the wage and bonus hold was not "misconduct" for the reasons set forth in Oberthur's Exceptions and its Reply to the GC's Answering Brief, this conduct is an insufficient basis on which to sustain an objection.

Assuming *arguendo* that Oberthur's adoption of the "hold" was a violation of Section 8(a)(1) and (3), it nevertheless is not capable of supporting an objection under the *Taylor Wharton* factors so as to set aside the election. Factor one does not weigh in favor of sustaining the objection, as the implementation of the wage hold was not part of a sustained pattern of unfair labor practices. Factor two likewise does not weigh in favor of sustaining the objection, as the hold was not implemented in a manner "likely to cause fear among the employees in the bargaining unit." To the contrary, Oberthur communicated to the employees that the company needed to "keep the status quo" during the period leading up to the election. [GC 6]. Moreover, there is no dispute that the wage and bonus hold was not accompanied by any discipline of employees or threats of discipline.

Factor three also weighs against sustaining the objection, as under the Union's own calculation, only sixteen employees out of a unit of nearly 230 had increases delayed as a result of the hold, while a single employee was "probably" denied a spot bonus. [Union Brief, p. 22]. Factor four also does not support sustaining the objection, as the hold was implemented a full month prior to the election and was accompanied by an explanation of the need to implement the rule for the purpose of maintaining the status quo and avoiding the appearance of vote buying. [GC 6]. Factor five likewise weighs against sustaining the objection, as the record contains no evidence suggesting that the issue persisted in the minds of unit employees in such a way as to affect their voting behavior.

Factor six weighs against sustaining the objection. Although the ALJ's Decision contains a blanket statement that "it would be fair to conclude that by the time of the election, many if not most of the employees in the voting unit were aware of this policy," the record is devoid of evidence supporting that assertion. [Decision, p. 11]. Factor seven, meanwhile, is neutral, as there was no evidence introduced of misconduct which would tend to "cancel out" the effect of Oberthur's implementation of the hold.

Because this analysis assumes *arguendo* that Oberthur's conduct in implementing the hold was in violation of the Act, factors eight and nine would weigh in support of sustaining the objection. Those factors, however, are significantly outweighed by the first seven factors as articulated in *Taylor Wharton*. Moreover, as addressed *supra* and as fully set forth in Oberthur's Exceptions Six and Seven, Oberthur's implementation of the hold was not an unfair labor practice, and this conduct is therefore not "misconduct" capable of sustaining an objection so as to set aside the election results. The ALJ's decision to sustain Objection No. 5 must therefore be reversed.

CONCLUSION

In light of the foregoing, Oberthur respectfully requests that the Board reverse the ALJ's findings that Oberthur violated Section 8(a) of the Act by restricting employee communications and by suspending wage increases and bonuses during the period prior to the election. Oberthur further requests that the Board reverse the ALJ's decision to sustain Objection No. 5.

With regard to the challenges made to the ballots cast by John DiTore and Ben Sahijwana, Oberthur requests that the Board reverse the ALJ's finding that DiTore and Sahijwana are professional employees and direct that the ballots be opened and counted. In the

alternative, Oberthur requests that the Board set aside the election and direct that a new election be held in the stipulated unit in accordance with the *Sonotone* voting procedure.

Dated: April 17, 2013.

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PROOF OF SERVICE

I am counsel to Respondent Oberthur Technologies of America Corporation in the instant proceeding. I am over the age of eighteen years and not a party to the proceeding; my business address is Seven Saint Paul Street, Baltimore, Maryland 21202.

On April 17, 2013, I caused the following documents to be served:

Employer's Answering Brief to Cross-Exceptions of Graphic Communications Conference, International brotherhood of Teamsters, Local 14-M, and Reply to Local 14-M's Answering Brief to Employer's Exceptions to Decision of the Administrative Law Judge

by electronic mail to:

Randy M. Girer Counsel for the Acting General Counsel National Labor Relations Board Region Four 615 Chestnut Street, 7th Floor Philadelphia, Pennsylvania 19106-4413

and

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Executed on April 17, 2013.

I declare under penalty of perjury under the laws of the State of Maryland that the foregoing Proof of Service is true and correct.

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